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In The

Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,

Appellants,

— *v.* —

THE STATE OF MISSISSIPPI, et al.,

Appellees.

On Appeal from the United States District Court
for the Southern District of Mississippi

BRIEF OF THE COUNTY OF ONONDAGA, NEW YORK, AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

In 1978 Congress passed the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117, et seq. ("PURPA") to, inter alia, help reduce the nation's use of oil and natural gas as fuels for electric energy generation. In short, Titles I and III of PURPA require state utility regulatory agencies to consider whether to adopt certain federal standards concerning retail rates for sales of electricity (Title I) and gas (Title III). Section 210 of Title II of PURPA required the Federal Energy Regulatory Commission ("FERC") to promulgate rules to

encourage cogeneration and small power productions[1] by March 1980, and requires state electric utility regulatory authorities to implement those rules thereafter, 16 U.S.C. (Supp. III) 824 a-3. More specifically Section 210 requires that said rules insure that 1) electric utilities sell electric energy to and purchase energy from cogeneration and small power production facilities at rates that are just, reasonable and in the public interest and which do not discriminate against those facilities 16 U.S.C. (Supp. III) 824 a-3(a)(b) and (c); and 2) and provides that those facilities are exempt from the Federal Power Act 16 U.S.C. §791a et seq., the Public Utility Holding Company Act 15 U.S.C. §79 et seq. and from state laws and regulations respecting the rates and financial or organizational regulation of electric utilities 16 U.S.C. (Supp. III) 824 a-3 (e). The FERC's rules regarding electric rates were published on February 25, 1980, 45 Fed. Reg. 12214 and the rules regarding exemptions were published on March 20, 1980, 45 Fed. Reg. 17959.

Prior to the adoption of PURPA, electric utilities were not required to cooperate with cogenerators or small power producers and therefore those potential energy producers were confronted with either a poor market or no market for their products coupled with high rates for purchased electricity. In addition, the prospect of extensive federal and state regulation discouraged development of these technologies. PURPA and the FERC rules promulgated thereunder have eliminated

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[1] A cogeneration facility is a facility which produces electric energy and steam or forms of useful energy (such as heat) which are used for industrial, heating or cooling purposes, 16 U.S.C. (Supp. III) 796(18)(A). A small power production facility is a facility which produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources - or any combination thereof; and has a power production capacity which, together with other facilities located at the same site . . . is not greater than 80 megawatts. 16 U.S.C. (Supp. III) 796(17)(A).

those impediments and granted cogenerators and small power producers a tremendous opportunity to develop energy production technologies which will use expensive fuels such as oil and natural gas more efficiently and/or use other and less expensive fuels for energy generation.

The County of Onondaga ("County"), a political subdivision of the State of New York, after years of painstaking effort and research concerning a solid waste disposal problem has recently developed a plan involving the construction of a combined resource recovery/cogeneration facility. Said facility will burn solid waste as a fuel and generate both steam and electric energy. The steam energy will heat several municipal buildings and be sold to certain institutional users while the electric energy will be sold to the local electric utility. The revenues anticipated from the sale of said energies are critical components of the financial plan for the project and those revenues cannot be assured without the protection of PURPA. The County therefore believes that the provisions of PURPA must be viewed as a benefit to the nation as a whole and to each State, and not, as was held below, an infringement of the sovereign rights of the several States.

For these reasons, the County of Onondaga submits this brief to urge this Court to reverse the decision rendered below and to declare PURPA constitutional.

The parties to this appeal have consented to the filing of this brief and copies of their consent letters have been filed with the Clerk of this Court.

ARGUMENT

A. PURPA IS A PROPER EXERCISE OF COMMERCE REGULATION

Article I, §8, clause 3 of the United States Constitution specifically grants Congress the power "[t]o regulate Commerce with foreign nations and among the several states . . . ." This Court has long held that said regulatory power is plenary and complete in itself, and has no limitations other than those prescribed in the Constitution, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), *United States* v. *Darby*, 312 U.S. 100 (1941). Said power is broad and sweeping, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) and even includes purely intrastate activity which substantially affects interstate commerce, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), *Fry* v. *United States*, 421 U.S. 542 (1975). This Court has recently set forth the standard by which Congressional action must be reviewed in a Commerce Clause context:

> ". . . The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, et al., 49 U.S.L.W. 4654, at 4656. (June 16, 1981).

The activities PURPA affects or regulates at issue here are the structuring of retail rates for electric (Title I) and gas (Title III) utilities and the determination of the status of cogeneration and small power production facilities in the marketplace Section 210 of Title II. Congress specifically stated in Sec. 2 of PURPA that PURPA was adopted to regulate interstate commerce. The issue thus becomes whether there is a rational basis for Congress' determination that electric and gas retail rates and cogeneration and small power production facilities affect interstate commerce.

It is respectfully submitted, that due to the very nature of electricity and gas and the equipment and technologies involved in the generation, distribution and use of those products, it cannot be denied that the retail rates for electric and gas utilities greatly affect interstate commerce, *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515 (1945). This is not negated by the fact that retail rate establishment has generally been left in the hands of state regulatory bodies. Congress is therefore authorized to adopt legislation in this area; this is particularly true where, as in Titles I and II of PURPA, the impact of said legislation on state bodies is minimal.

Nor can it be denied, due to the diverse nature of the fuels, products and technologies used or to be used in cogeneration and small power production facilities, that such activities do and will significantly affect interstate commerce. Clearly no impediment exists, save perhaps the Tenth Amendment, to prevent Congress from exercising its authority to regulate such activity.

B. PURPA DOES NOT VIOLATE THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution provides that ". . . the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power of the federal government to create legislation is thereby limited to the powers granted it in the Constitution and by the powers reserved to the people and States. The Court below held that PURPA imposes duties upon the State of Mississippi which violate the Tenth Amendment and is therefore unconstitutional. To properly analyze the question of PURPA's constitutionality it is first necessary to review what PURPA required each State to do.

Title I of PURPA *requires* state regulatory authorities to undertake the following action:

1. Consider and make a determination concerning whether it is appropriate for said authority to implement certain federal standards concerning retail rates for electric utilities with respect to the utilities it regulates. Sec. 111(a), 16 U.S.C. (Supp. III) 2621(a). Each state authority is free to implement or decline to implement such standards, Sec. 111(c)(1), 16 U.S.C. (Supp. III) 2621(c)(1). If, however, an authority declines to implement such standards it must state the reasons for said decision in writing and make that writing available to the public, Sec. 111(c)(2), 16 U.S.C. (Supp. III) 2621(c)(2). The written determination referred to above shall only be made after a noticed hearing and must be based upon evidence presented at said hearing. Sec. 111(b)(1), 16 U.S.C. (Supp. III) 2621(b)(1). Procedurally, the required consideration or hearing shall be conducted according to the rules established by the authority but the Secretary of Energy, any effected utility or any consumer of an affected utility must be allowed to intervene. Secs. 111(b)(2), 16 U.S.C. (Supp. III) 2621(b)(2) and 121(a), 16 U.S.C. (Supp. III) 2631(a). Within two years of the enactment of PURPA (November 9, 1978) each regulatory authority must have commenced or scheduled the above referenced hearing and within three years from PURPA's enactment the determination regarding the federal standards must be made, Sec. 112(b), 16 U.S.C. (Supp. III) 2622(b). Failing that each regulatory authority must undertake the required federal standards consideration in the first rate proceeding occurring after PURPA's third anniversary, Sec. 112(c), 16 U.S.C. (Supp. III) 2623.

2. Section 113 of PURPA, 16 U.S.C. (Supp. III) 2623 requires each State regulatory authority to conduct a noticed hearing, within two years of PURPA's enactment concerning a second set of federal standards regarding electric utility practices Sec. 113(a)(b), 16 U.S.C. (Supp. III) 2623(a)(b). Each authority is free to adopt or not adopt such standards, Sec. 113(a), but if such standards are not adopted the authority must state in writing why it has not adopted such standards

and make that writing available to the public. Sec. 113(c), 16 U.S.C. (Supp. III) 2623(c).

3. Finally, each authority must, within one year after PURPA's enactment and annually for ten years thereafter, submit a written report to the Secretary of Energy regarding the status of the consideration of the above referenced standards. Sec. 116(a), 16 U.S.C. (Supp. III) 2626(a).

Section 210 of Title II of PURPA, 16 U.S.C. (Supp. III) 824 a-3 required the Federal Energy Regulatory Commission to within one year of PURPA's enactment, and after consultation with state regulatory authorities,

1) Prescribe rules requiring electric utilities to sell electric energy to cogeneration and small power production facilities and to purchase electric energy from such facilities. Sec. 210(a), 16 U.S.C. (Supp. III) 824 a-3(a). Said rules must insure that the rates for such sales and purchases of electric energy must be just, reasonable, in the public interest and nondiscriminatory as to cogeneration or small power producers Sec. 210(b) and (c), 16 U.S.C. (Supp. III) 824 a-3(b)(c).

2) Prescribe rules under which cogeneration and small power production facilities "are exempted in whole or in part from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations regarding rates, or respecting the financial or organizational regulation of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production". Sec. 210(e)(1), 16 U.S.C. (Supp. III) 824 a-3(e)(1).

Section 210(f), 16 U.S.C. (Supp. III) 824 a-3(f) requires each State regulatory authority to implement the cogeneration and small power production rules adopted by FERC within one year of such adoption. FERC is specifically empowered to enforce compliance with 210(f) against any State regulatory authority, Sec. 210(h)(2)(A), 16 U.S.C. (Supp. III) 824 a-3(h)

(2)(A) and other persons or entities were also granted the right to enforce compliance with 210(f) should FERC fail to do so Sec. 210(h)(2)(B), 16 U.S.C. (Supp. III) 824 a-3(h)(2)(B).

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) this Court set forth the test to be applied whenever federal legislation is subjected to a Tenth Amendment challenge. Very recently this Court has re-stated the elements of that test:

> "First, there must be a showing that the challenged statute regulates the "States as States". [Usery] at 854. Second, the federal regulation must address matters that are indisputably "attributes of State sovereignty." Id., at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions". Id., at 852 *Hodel*, supra at 4660.

It is not disputed that the portions of PURPA at issue here regulate the States as States. Both Title I and Section 210 of Title II require State or regulatory authorities, not private businesses or individuals, to undertake certain actions. However, PURPA clearly does not violate the second or third portions of the above referenced test. As to the second part, no law exists stating that the establishing of electric utility retail rates or the determinations of the status of cogenerators or small power production facilities are matters solely within the sovereign rights of each state. In truth, these issues will affect interstate commerce and are therefore federal, not state, issues and are thus not sovereign matters for each state. It is submitted that the history of federal noninvolvement in determining retail electric rates grows out of public policy considerations, not any constitutional limitation.

As to the third portion of the *National League of Cities* test it is readily apparent that PURPA's requirements will not impair the ability of any state to structure integral operations in areas of traditional functions. Title I of PURPA merely required State regulatory authorities to review and consider adopting standards which Congress has deemed to be valuable

regarding retail rate determinations. Each state is completely free under PURPA to choose not to adopt such standards Sec. 111(a)(c)(1) and Sec. 113(a), 16 U.S.C. (Supp. III) 2621 (a)(c)(1) and 2623(a). Even if one presumes that electric retail rate establishment is a traditional state function, neither the simple requirement to consider standards nor the various basic procedural or notice requirements contained in Title I can realistically be viewed as a direct impairment of a State operation.

As to Section 210 of Title II it cannot be maintained that rate or exemption determinations for cogeneration or small power production facilities is or has ever been a traditional function of any State. At issue is a very broad range of technologies and processes, some old, some new, which have not been subject to government regulation on either a State or federal level. Section 210 commands FERC to establish regulations to allow these fledgling industries to grow without severe government interference and without electric utility noncooperation. It does not interfere with any established State function.

Moreover, even where it is determined that the *National League of Cities* requirements are met this Court has indicated that a balancing of interests test must be applied to determine whether the nature of the interest advanced by the federal legislation justifies State submission[2]. In this regard, it is submitted that the actions PURPA require State regulatory authorities to undertake are de minimus when compared to the benefits which the nation will derive from "the increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers." Sec. 2(1) 16 U.S.C. (Supp. III) 2601(1).

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2 *Fry* v. *United States*, supra., reaffirmed in *National League of Cities* v. *Usery*, supra., at 852-853. See Also id, at 856 (Blackmun, J. concurring).

CONCLUSION

The actions PURPA requires of states are minimal and do not amount to significant impositions or interferences with state sovereign powers. In addition, the basic objective of PURPA is to increase conservation and efficient use of energy generation fuels, a cause in the national interest requiring each state's cooperation. Titles I and III and Section 210 of Title II of PURPA should therefore be declared constitutional.

For the foregoing reasons, this Court should reverse the opinion of the district court.

Respectfully submitted,

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